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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LATISHA A. CURRY, Defendant and Appellant.	A123695 (Alameda County Super. Ct. Nos. CH42784 & CH43149)

I. INTRODUCTION

Appellant appeals from an order of the Alameda County Superior Court revoking her probation, which was granted to her in October 2007 after she had pled no contest to three charges in two separate cases. In March 2008, the Alameda County District Attorney filed a petition to revoke her probation because, it was alleged, she had taken merchandise from a pharmacy located in a Lucky store in San Lorenzo without paying for it. After a hearing in December 2008, the trial court determined that there was sufficient evidence that such had occurred, ordered appellant's probation terminated, and sentenced her to concurrent low terms on the 2007 charges. Appellant claims there was insufficient evidence to support the violation of probation charge. We disagree and hence affirm the order vacating probation.

II. FACTUAL AND PROCEDURAL BACKGROUND

On April 30, 2007, pursuant to a plea bargain in case No. CH42784, appellant pled no contest to one count of receiving stolen property (Pen. Code, § 496).[1] On August 16, 2007, in case No. CH43149, appellant also pled no contest to second degree commercial burglary (§ 459) and grand theft (§ 487, subd. (a)).

At a combined sentencing hearing on October 18, 2007, the trial court suspended imposition of a prison sentence in both cases, and placed appellant on five (5) years probation. One of the conditions of probation was that she "[o]bey all laws of the community and be of good conduct."

On February 13, 2008, Stephanie Vergara was working as a pharmacy clerk at a Lucky store on Hesperian Boulevard in San Lorenzo. On that day, an African-American woman in her thirties (later identified by Vergara as appellant) came to the pharmacy counter and asked Vergara to fill two prescriptions for a person named Eric Williams and two others for another person named Margo Hall. The store's electronic system confirmed that both those people had given Lucky's permission to allow appellant to pick up their prescriptions. And Vergara recalled that appellant had previously been there picking up those prescriptions.

Vergara noticed that, when appellant first approached her, she was accompanied by a "pretty stocky" African-American man who was never identified. While appellant waited for a pharmacist to fill the four prescriptions, the man left the counter area and went elsewhere in the store.

After all four prescriptions were filled, appellant gave Vergara a check to pay for them. But Vergara noticed that the check did not "look real" because it did not have the customary routing numbers printed on the bottom. Nevertheless, Vergara tried to process the check via the store's check reading machine. When that did not work and the check got "ripped," Vergara returned the check to appellant. The latter then gave her a second

[1] All subsequent statutory references are to the Penal Code.

check, but it also did not have any routing numbers on the bottom, and was likewise not accepted by the check reading machine.

Thinking that, possibly, the check reading machine was malfunctioning, Vergara called an assistant store manager, Marty Jackson, for assistance. Jackson had worked at the store for 20 years, and had been trained to identify bad checks. He examined the second check appellant had proffered to Vergara[2] and determined that, because it did not have routing numbers on the bottom, it was invalid. He told appellant the store could not accept that check, and returned it to her.

No one else was at the counter when Jackson spoke to appellant, but he identified her in court as the person he was speaking to on this subject that day.

In the meantime, the four filled prescriptions had been placed in bottles by the pharmacist and then those bottles placed in a bag by Vergara and the bag placed on the counter. Vergara then turned away in order to attempt to process appellant's checks; when she returned to the counter and told appellant that the checks were invalid, appellant stated that she had another, valid, check in her car and would go get it. She left the store, never to return, and a few minutes later Vergara noticed that the bag with the four medications was gone, too.

The only other person at the counter when this occurred was another woman, who later spoke about the incident with Vergara and, in so doing, helped identify appellant as the woman who had come to the counter. However, that woman asked to remain anonymous and did not testify at the hearing.[3]

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[2] Respondent's brief is incorrect when it recites that Jackson examined both checks proffered by appellant; he examined only the second one.

[3] Respondent's brief is also incorrect when it states that the woman who wished to remain anonymous in her conversation with Vergara about appellant's identity also "spoke to . . . the police about the theft." There was no testimony from either Vergara or Jackson to that effect. Finally, respondent's brief is incorrect when it recites that, besides the "anonymous woman" (i.e., the woman who wished to remain anonymous after talking to Vergara concerning appellant's identity) there was "another woman with a young child who was nearby" who also "spoke to Vergara and the police about the theft." There was no such testimony from Vergara.

About a week after the incident, Vergara identified appellant in a photo line-up presented to her by the police. And, as noted above, she also identified her in court.

On March 6, 2008, the Alameda County District Attorney filed a petition to revoke appellant's probation, alleging that she had committed petty theft with a prior conviction. (§§ 484, subd. (a)/666.)

On October 29, 2008, a revocation hearing was held at which the District Attorney put on the evidence summarized above; appellant presented no evidence. After hearing that evidence, the trial court found the allegations of the petition to be true and thus revoked appellant's probation.

On December 3, 2008, the court terminated appellant's probation and sentenced her to state prison for the 16-month low term on both cases, to run concurrently.

Appellant filed timely notices of appeal on January 2, 2009.

III. DISCUSSION

The governing statutory provision in this type of case is section 1203.2, subdivision (a), which provides that a court is authorized to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her probation . . . ." As our Supreme Court has made clear, the standard of review of an order revoking probation issued pursuant to that provision is "preponderance of the evidence." (See e.g., *People v. Rodriguez* (1990) 51 Cal.3d 437, 440-447; see also *In re Eddie M.* (2003) 31 Cal.4th 480, 505-506; *People v. Monette* (1994) 25 Cal.App.4th 1572, 1575 (*Monette*); *People v. Jackson* (2005) 134 Cal.App.4th 929, 935; *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 60-61; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066.) As the court in *Monette* stated: "The role of the trial court at a probation revocation hearing is not to determine whether the probationer is guilty or innocent of a crime but whether he [or she] can be safely allowed to remain in society." (*Monette, supra,* 25 Cal.App.4th at p. 1575.) We believe the evidence before the trial court met that test.

That evidence established that appellant presented two checks to the Lucky clerk, Vergara. The first "didn't look real" to Vergara, although that conclusion couldn't be

verified because the first check then got "stuck and ripped" while going through the store's check validation machine. But the appearance of the second check raised substantial questions in the mind of Vergara, who then called in assistant manager Jackson. He testified that he had considerable training and experience in viewing checks for their validity and, based on that experience, thought the check was not valid. Additionally, and perhaps more importantly, the check-validating machine at the store rejected that second check.

Then appellant told both Vergara and Jackson that she had some other, allegedly valid, checks in her car and would go get them. She did not do so and, more importantly, never returned to the store.

Then Jackson and Vergara noted that the drugs being picked up by appellant for two other people were missing from the counter. There was no testimony that there were many people around the counter at the time—indeed, the only other person mentioned by Vergara was the "anonymous woman" who thereafter helped identify appellant for the store.

We hold that the combination of (1) one almost certainly bad check proffered by appellant to the store (2) her disappearance from the store after representing that she was going to her car to get a good check, and (3) the lack of other possible culprits who could have "lifted" the drugs from the counter constitutes substantial evidence justifying, under the applicable standard of review, the court's order.

IV. DISPOSITION

The order revoking probation is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.